Nos. 94-1749, 1750

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEAN JONES, *et al.*, MARK DUSBABEK, *et al.*,

Petitioners,

—v.—

REGGIE WHITE, *et al.*,

Respondent/Plaintiffs,

NATIONAL FOOTBALL LEAGUE, *et al.*,

Respondent/Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT/PLAINTIFFS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts erred in finding that Petitioners submitted to personal jurisdiction by filing appearances and voluntarily challenging the merits of a proposed class action settlement agreement.

2. Whether, as a matter of fact, Petitioners waived any due process challenge to the District Court's certification of a Rule 23(b)(1) non-opt-out class.

3. Whether the District Court's approval of a class action settlement agreement as fair, reasonable and adequate to class members, and the Court of Appeal's affirmance of that approval, constituted an abuse of discretion.

PARTIES TO THIS PROCEEDING

The Petitioners in this proceeding are eighteen individual class members out of a class of over 5,000. They are Sean Jones, Leslie O'Neal, Eric Allen, Cris Dishman, William Matthews, and Van Waiters (the "California Objectors"); Mark Dusbabek, Carl Lee, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe, and Gregory Scales (the "Viking Objectors"); Maurice Hurst, John Fourcade, and Byron Evans. Petitioners appeared and voluntarily objected to the merits of a class action settlement in proceedings before the United States District Court for the District of Minnesota, and were appellants before the United States Court of Appeals for the Eighth Circuit.

Respondent/Plaintiffs Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy, and Dave Duerson were plaintiffs and class representatives in the proceedings before the District Court, and appellees before the Court of Appeals.

Respondent/Defendants the National Football League and its twenty-eight member clubs ("NFL") were defendants in the proceedings before the District Court, and appellees before the Court of Appeals.

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BRIEF FOR THE RESPONDENT/PLAINTIFFS IN OPPOSITION

RULES INVOLVED

Certification and settlement of the class action below was carried out pursuant to Federal Rule of Civil Procedure 23.

STATEMENT OF THE CASE

Introduction

Petitioners—18 individual members of a class of more than 5,000—seek this Court's review of orders of the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Minnesota, approving as fair, reasonable, and adequate a class action stipulation and settlement agreement (the "Settlement Agreement") between Respondent/Defendants, The National Football League and its 28 member clubs (the "NFL"), and Respondent/Plaintiffs Reggie White, *et al.*, on behalf of themselves and a class of current and former professional football players (the "Class").[1]

Although petitioners try mightily to portray this action as raising the same constitutional issue which this Court initially granted certiorari to review in *Ticor Title Insurance Co. v. Brown*, __ U.S. __, 114 S. Ct. 1359 (1994), that due process issue was never reached or decided by the Court of Appeals below. *See White v. National Football League*, 41 F.3d 402 (8th Cir. 1994). To the contrary, the Court of Appeals unanimously affirmed the District Court's decision on the more narrow grounds that: (i) Petitioners had waived any due process objections because they had submitted themselves to the

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[1] The Settlement Agreement is the cornerstone of a global litigation settlement resolving six years of litigation, including two dozen separate lawsuits, between the NFL and professional football players. The Settlement Agreement, which has been operating successfully in the NFL for the past two seasons, has provided these players for the first time in history with a comprehensive system of meaningful free agency; and further provides monetary relief, in the amount of $115 million, to class members who were injured as a result of the player restrictions that were in place in the NFL from 1989 through 1992. The new free agency system created by the Settlement Agreement has now been included in a Collective Bargaining Agreement ("CBA"). The CBA was overwhelmingly approved by more than 96% of the NFL players who voted. *White v. National Football League*, 836 F. Supp. 1458, 1467 (D. Minn. 1993).

District Court's jurisdiction by voluntarily litigating the *merits* of the Settlement Agreement (as opposed to just contesting jurisdiction); and (ii) the Settlement Agreement was fair, reasonable and adequate, and in the best interests of the Class. Neither of these fact-specific determinations presents any conflict with the decisions of this Court or any circuit court; nor do they present any significant issue of law that would warrant a grant of certiorari in this case.

The *White* Case And Its Predecessors

On September 21, 1992, Respondent/Plaintiffs commenced the *White* case on behalf of themselves and a class of professional football players against Respondent/Defendants, the NFL and its twenty-eight member clubs. The complaint initially sought only injunctive relief, but was later amended to also seek antitrust damages arising out of, *inter alia*, the operation of various restraints on competition for NFL player services, including the so-called "Plan B" right of first refusal/compensation ("RFR/C") rules, the college draft, the Uniform NFL Player Contract and the NFL's pre-season pay rules. *See White v. National Football League*, 836 F. Supp. 1458, 1462 (D. Minn. 1993).[2] Defendants answered the *White* complaint, denying all material allegations and asserting various affirmative defenses. *Id.* Thereafter, plaintiffs moved for a preliminary injunction to prohibit the continued imposition of the Plan B rules or any similar restrictions, and to permit players whose contracts expired to sell their services to other NFL

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[2] Under the Plan B RFR/C rules which were in effect for the 1989 through 1992 NFL seasons, each NFL club "restricted" 37 veteran players, whether or not those players remained under contract to the team. Pursuant to Plan B, a team had the right to match any offer made by another NFL club to one of its restricted players (the right of first refusal); further, if the player's former club did not choose to match such an offer, the old club was entitled to receive "compensation" from the acquiring club in the form of one or more draft choices from the NFL's college draft. *White v. National Football League*, 822 F. Supp. 1389, 1480 (D. Minn. 1993).

teams. *White v. National Football League*, 822 F. Supp. 1389, 1395 (D. Minn. 1993).

The *White* action followed closely on the heels of two other lawsuits previously filed in the United States District Court for the District of Minnesota challenging the Plan B RFR/C rules. On September 10, 1992, following a three month trial before Judge David S. Doty, the jury in *McNeil v. NFL*, 4-90-476 (D. Minn.)—a lawsuit brought by eight professional football players against the NFL and its member clubs—found that the Plan B RFR/C rules violated Section 1 of the Sherman Act, 15 U.S.C. § 1, because they: (i) substantially harmed "competition in the relevant market for the services of professional football players"; and (ii) were "more restrictive than reasonably necessary." *White*, 822 F. Supp. at 1398. The jury found that all eight *McNeil* plaintiffs suffered antitrust injury, but awarded damages to only four. *Id.*

Shortly after the jury returned its verdict in *McNeil*, ten individual NFL players who had not signed contracts for the already commenced 1992 NFL season brought an antitrust action against the NFL and its clubs seeking, *inter alia*, injunctive relief, to stop the Plan B rules from being applied to them. *Jackson v. NFL*, 802 F. Supp. 226 (D. Minn. 1992). On September 24, 1992, Judge Doty issued a temporary restraining order against the continued operation of Plan B, thereby permitting those ten players to sign contracts with any NFL clubs. *Id.* at 235.

Each of the above cases, as well as numerous other suits brought by individual NFL players against the NFL Clubs, were financially supported by the National Football League Players Association ("NFLPA"), which is currently the collective bargaining representative for all NFL players.[3]

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[3] After the Eighth Circuit ruled on November 1, 1989, in *Powell v. NFL*, 930 F.2d 1273 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), that previously agreed to player restrictions were exempt from antitrust challenge as long as the players continued to be represented by

The Global Litigation Settlement

On January 6, 1993, the parties to *White*, *McNeil*, *Jackson* and over twenty other lawsuits involving professional football players and NFL teams reached agreement in principle on a global settlement of these lawsuits, with the *White* class action settlement as its centerpiece. *White*, 822 F. Supp. at 1435.

By order dated January 6, 1993, as amended and reaffirmed on February 17, 1993, the District Court in *White* certified, for the purposes of settlement, a damages and injunctive relief class, pursuant to Fed. R. Civ. P. 23(b)(1), consisting of:

> (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, through the date of final approval of the settlement of this action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team.

On February 26, 1993, the plaintiffs and defendants in *White* formally entered into the class action Settlement Agree-

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a union, a majority of NFL players voted to terminate the NFLPA's union status. Thereafter, the NFLPA was reconstituted as a professional association, which financed and supported litigation by players against the NFL, such as the *McNeil* and *White* actions, aimed at ending unreasonable restrictions on players' freedom of movement.

After an agreement in principle was reached settling the *White* class action, the NFLPA sought once again to become the collective bargaining representative for NFL players. *White*, 822 F. Supp. at 1396. Subsequently, the NFLPA was authorized by a majority of NFL players to represent them for purposes of collective bargaining, and by letter dated March 29, 1993, the NFL recognized the NFLPA as the sole and exclusive collective bargaining representative of present and future NFL players. *Id.* at 1397, 1435.

ment. In addition, the parties to the related NFL player lawsuits being supported by the NFLPA reached agreements to separately settle those actions. *White*, 822 F. Supp. at 1395-96. The concurrent resolution of the *White* class action with twenty-three related lawsuits supported by the NFLPA brought an end to seven years of litigation between the NFL teams and their players.

Proceedings Before the District Court

The District Court evaluated the *White* Settlement Agreement using "the two-stage procedure suggested in the *Manual for Complex Litigation*, § 30.44, at 241-42 (2d ed. 1985)." *White*, 822 F. Supp. at 1399. First, after a preliminary hearing on February 26, 1993, at which a few class members appeared in opposition to the Settlement Agreement, the District Court determined that "the proposed settlement fell within the range of possible approval." *Id.* Second, the District Court ordered that notice of the Settlement Agreement, which provided that objectors would have an opportunity to appear and be heard at a final approval hearing, be mailed to individual class members and published. *Id.*

Pursuant to the Court's order, plaintiffs mailed notice of the Settlement Agreement to over 5,000 class members at their last-known addresses, and published notice of the agreement in the *USA Today* newspaper. *Id.* at 1400. In response, 58 class members, one player agent, and one defendant submitted briefs and affidavits in opposition to the Settlement Agreement on or before the April 2 deadline reflected in the notice. In addition, the District Court accepted and considered briefs and affidavits on behalf of thirty other class members who submitted their briefs after this deadline. In total, more than 50 briefs and affidavits, comprising thousands of pages, were submitted by both supporters and opponents of the Settlement Agreement for the District Court's review. *Id.* at 1424-25.

On April 16, 1993, the District Court held a final approval hearing, at which parties and class members were given the opportunity to be heard in support of or in opposition to the Settlement Agreement, irrespective of whether they had previously submitted their positions in writing. At the hearing, which lasted over ten hours, parties and objectors presented oral argument, and witnesses, who were subject to cross-examination, testified in favor of, or against, the Settlement Agreement. *Id.* Each of the Petitioners herein submitted briefs attacking the merits of the Settlement Agreement and voluntarily appeared, in person or through counsel, at the final approval hearing to contest the merits of the Settlement Agreement.

Based upon an exhaustive review of the record before him, on April 30, 1993, Judge David S. Doty issued a 115-page Order in which he found that the Settlement Agreement was fair, reasonable, adequate and in the best interests of the Class. Among the benefits to the Class found by the District Court were: (i) a "radically modified player reservation system," pursuant to which almost all players with at least five years of experience (four, if a salary cap is in place) would have the opportunity to become unrestricted free agents (822 F. Supp. at 1419); (ii) substantially increased "tender" requirements before a club could limit the free agency rights of those players still subject to some restrictions (*id.*); (iii) significantly reduced restrictions on those players who are still subject to free agency limitations (*id.*); (iv) a greatly reduced number of rookies subject to the NFL's college draft, due to a reduction in the number of rounds of the draft from twelve to seven (*id.*); (v) strict anti-collusion provisions, to deter and punish collusion by or between the NFL and its teams (*id.*); (vi) guaranteed annual payments to players in salaries and benefits of at least fifty-eight percent of defined revenues (in any year in which there is a salary cap), the highest such guarantee in professional team sports; and (vii)

settlement payments to class members of $115 million ($17 million of which has already been distributed (*id.*)).[4]

In addition, the District Court found, *inter alia*, that: (i) objections to specific provisions of the Settlement Agreement by a small number of class members did not merit disapproval because the "Agreement as a whole is fair, reasonable and adequate to the class" (822 F. Supp. at 1426); (ii) mail and publication notice to the Class satisfied "the requirements of [Fed. R. Civ. P.] 23 and due process" (*id.* at 1402); (iii) the plaintiffs and class counsel "competently and vigorously represented the interests" of the Class (*id.* at 1405); and (iv) the individual objectors had waived any due process objections to a non-opt-out class and submitted to the court's jurisdiction, because they did not confine "their arguments to the claim that they [were] beyond the court's jurisdiction" but rather "objected to the merits of the proposed settlement" (*id.* at 1432).

Following preliminary approval, the unprecedented free agency system created by the Settlement Agreement became effective. 822 F. Supp. at 1420. As a result, class members have already enjoyed the substantial benefits of this new system for more than two years. During this period, hundreds of NFL players have switched clubs as Unrestricted Free Agents; many more Restricted Free Agents have received offers from other teams than ever did under Plan B; and average player salaries throughout the NFL have increased by more than fifty percent, providing hundreds of millions of dollars in addi-

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[4] In addition, it was agreed that the named plaintiffs in *White* and *Lewis v. NFL*, Civ. A. No. 91-2685 (D.D.C.), would receive the following amounts: Reggie White - $0; Michael Buck - $134,805; Vann McElroy - $470,194; Hardy Nickerson - $494,836; Albert Lewis - $711,600; and Wayne Radloff - $214,115. The named plaintiff for pre-season pay claims, Dave Duerson, will receive $98,302. These sums reflect the amount of damages these plaintiffs would have sought at trial, before trebling, and will not be paid from the $115 million *White* Settlement Fund. *White*, 822 F. Supp. at 1415.

tional compensation to class members. *See White*, 836 F. Supp. at 1479-80.

In addition to the new free agency system, and the $115 million in damages paid into the *White* Settlement Fund, substantial additional benefits to class members were provided by other parts of the global litigation settlement, as set forth below:

Back Pay - The settlement of *NFLPA v. NFL Management Council*, a lawsuit commenced on behalf of all NFL players who were denied one week's pay after returning to work at the end of the 1987 players' strike, provided for payment by the NFL to the striking players, all of whom are *White* class members, of $30 million. *White*, 822 F. Supp. at 1415.

Individual Player Lawsuits - In addition to the *McNeil* and *Jackson* cases, there were eight other lawsuits by individual players, supported by the NFLPA, that predated the *White* class action. These lawsuits challenged the legality of Plan B and other restrictions on player employment. All of these cases, plus *McNeil*, *Jackson*, *Lewis* and *Powell*, were found to have contributed substantially to the ability of class counsel to negotiate the *White* Settlement Agreement on terms highly favorable to the Class. *White*, 822 F. Supp. at 1405, 1407. The related player actions were settled separately for payments totalling $19,028,628. *Id.* at 1416.[5]

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[5] The other player lawsuits settled at this time included: *Joyner v. NFL*, Civ. No. 92-2876 (E.D. Pa.); *Allen v. Chargers Football Co.*, Civ. No. 91-4322 (C.D. Cal.); *Hebert v. Los Angeles Raiders*, Civ. No. S023546 (Sup. Ct. Cal.); *Solomon v. NFL*, Civ. No. 92-1244-F (D. Tex.); *Morris v. New York Giants, Inc.* (Arbitration before Hon. Bernard S. Meyer); *Chandler v. Indianapolis Colts, Inc.*, Civ. No. 54601-9009-CP-0453 (Ind. Cir. Ct.); *Mullin v. Los Angeles Rams Football Co.*, No. B063729 (Cal. Ct. App.); *Tice v. Pro Football, Inc.*, Civ. No. 91-2314 (D.D.C.); *Powell v. NFL*, Civ. No. 4-87-917 (D. Minn.), No. 91-3430MN (8th Cir.); *Five Smiths v. NFLPA*, Civ. No. 4-90-261 (D. Minn), No. 92-2118MN (8th Cir.); and *NFL v. NFLPA and Hilton*, Civ. No. 4-91-877 (D. Minn.).

Reimbursement To The NFLPA Of Litigation Expenses- All of the actions mentioned above, including *McNeil, Jackson, Lewis* and *White*, were funded by the NFLPA. As part of the global litigation settlement, the NFL Clubs agreed to pay the NFLPA, for the benefit of NFL players, $18,847,520, as partial reimbursement for the attorneys' fees, disbursements and other expenses it incurred to support the *McNeil* case, the *White* case, and all related player lawsuits. *White*, 822 F. Supp. at 1416.[6]

When considered with the $115 million that will be directly distributed as part of the *White* settlement, a total of $195 million will be disbursed for the benefit of NFL players.

On May 6, 1993, the NFL and the NFLPA reached agreement on the terms of a new collective bargaining agreement (the "CBA"). The CBA incorporated most of the terms of the *White* Settlement Agreement relating to the new free agency system. In addition, as a result of the CBA, the NFL defendants and class counsel agreed to amend a few specific provisions of the *White* Settlement Agreement, and class plaintiffs moved the District Court to approve these amendments. *White*, 836 F. Supp. at 1469. The CBA was subsequently ratified by 96% percent of the NFL players who voted on ratification. *Id.* at 1467, 1485.

The District Court held a preliminary approval hearing on the proposed amendments to the Settlement Agreement on

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[6] In addition, as part of the global litigation settlement, the parties to various lawsuits between and among the NFLPA, NFL Properties, Inc. (the NFL's licensing arm), various individual players, and various NFLPA and NFL Properties licensees, also reached a settlement of their lawsuits, under which the right of NFL players to engage in group licensing through the NFLPA was preserved and recognized. In addition, the NFLPA received $10 million in settlement payments and a guarantee of at least $5 million a year in additional licensing revenues from 1993 through 1999. All of the monies received by the NFLPA pursuant to this settlement will be distributed to, or used directly for the benefit of, NFL players. *White*, 822 F. Supp. at 1415-16; *White*, 836 F. Supp. at 1476.

June 1, 1993. Notice of the hearing was provided to all class members, including Petitioners, who had previously objected to approval of the Settlement Agreement. In an order dated June 2, 1993, the District Court preliminarily approved the proposed amended Settlement Agreement, ordered that notice again be mailed to class members and published, and gave all class members the opportunity to object in writing to the proposed amended Settlement Agreement. Plaintiffs thereafter mailed notice to the over 2,500 class members who were likely to be affected by the amendments to the Settlement Agreement and once again published notice in *USA Today*. *White*, 836 F. Supp. at 1469.

Twenty-eight class members, all of whom had previously objected, and one defendant, submitted briefs and affidavits in opposition to the amended Settlement Agreement. A second "final" approval hearing was held on July 7, 1993, during which class members were again given the opportunity to present oral argument and testimony in opposition to the amended Settlement Agreement. *Id.* at 1470. After considering all of the evidence and arguments presented, on August 20, 1993, the District Court entered a 116-page order in which the Court reaffirmed its prior order and concluded that the amended Settlement Agreement, as a whole, was in the best interests of the Class and should be approved.

Proceedings Before the Court of Appeals

On appeal, the Eighth Circuit affirmed the District Court's determination that the Settlement Agreement was fair, reasonable and adequate, and in the best interests of the Class. *White*, 41 F.3d at 408. Further, the Court of Appeals unanimously held that "each of the objectors either had minimum contacts with the forum or submitted himself to the jurisdiction of the District Court by appearing through counsel to contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement." *Id.* Based on this factual determi-

nation of waiver, the Court of Appeals found it unnecessary to "reach the [constitutional] issue raised by the objectors" regarding "whether a trial court may certify a non-opt-out plaintiff class in an action brought primarily for injunctive relief under Fed. R. Civ. P. 23(b)(1)." *Id.*

The Court of Appeals also rejected the claim by certain objectors that "the named plaintiffs and their counsel inadequately represented the class." *Id.* To the contrary, the Court of Appeals found "substantial evidence that the settlement agreement provides significant benefits to the class" from which the District Court "reasonably concluded that the interests of the plaintiff class were protected by the settlement agreement." *Id.* In addition, the Court of Appeals held that "class members received adequate notice of the proposed settlement and were given multiple opportunities to challenge their inclusion in the plaintiff class." *Id.* at 408-09.

An order denying the motion by certain Petitioners for rehearing *en banc* was entered by the Court of Appeals on January 20, 1995.

ARGUMENT

THE FACT-SPECIFIC, UNANIMOUS DECISION OF THE COURT OF APPEALS APPROVING THIS CLASS ACTION SETTLEMENT AGREEMENT DOES NOT RAISE ANY ISSUE WARRANTING THIS COURT'S REVIEW

The decision of the Court of Appeals does not present any "special" or "important" question of federal law which would warrant review by this Court. Supreme Court Rule 10. There is no conflict with the decisions of any circuit or the prior decisions of this Court. Nor is there any legal question of exceptional importance resolved by the decision below.

Contrary to the claims of Petitioners, their "due process" challenge to the application of a Rule 23(b)(1) class certifi-

cation to absent class members was never decided by the Court of Appeals below. Instead, all that the Court of Appeals did, in a unanimous opinion, was apply well-established authority to: (i) affirm, as a factual matter, that the individual objectors had waived their due process argument by voluntarily appearing and challenging the *merits* of the *White* Settlement Agreement; (ii) determine that the notice to the Class was proper and that the Class was adequately represented; and (iii) determine that the District Court did not abuse its discretion in concluding that the Settlement Agreement was fair, reasonable, adequate and in the best interests of the Class. *White*, 41 F.3d 402. None of these fact-based determinations present any issue warranting review by this Court.

A. This Case Does Not Properly Present Any Constitutional Issue Concerning The Application Of Rule 23(b)(1) To Absent Class Members

Petitioners claim to be seeking review of the application of this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), to a Rule 23(b)(1) class action. That due process issue, however, was never reached or decided by the Court of Appeals below, and thus is not properly presented by the petitions. Rather, the Court of Appeals simply applied well-established authority to conclude that, as a factual matter, each of the objectors had, by their actions, subjected themselves to the jurisdiction of the District Court (thus precluding any due process objections).

"It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984), and cases cited therein. It thus has been this Court's uniform "practice to avoid the unnecessary decision of novel constitutional questions" when there exists a sufficient non-constitutional basis for resolving a dispute. *See*

Leroy v. Great Western United Corp., 443 U.S. 173, 181 (1979); *Ticor Title Insurance Co. v. Brown*, __ U.S. __, 114 S. Ct. 1359 (1994). As the Court of Appeals concluded, a non-constitutional basis for the decision below (waiver) exists here, and thus there was and is no need to reach the due process issue asserted by Petitioners.

Petitioner's constitutional argument is premised upon the decision in *Shutts*, where this Court determined that, in a class action "wholly or predominantly for money judgments," a court could, consistent with due process, bind absent class members, not otherwise subject to the jurisdiction of the court, to a class action settlement, so long as it provided a number of procedural protections, including the right to opt-out. 472 U.S. at 811-12 & n.3. The new constitutional issue asserted by Petitioners is whether, consistent with the holding of *Shutts*, a court may bind absent class members, who are not otherwise subject to the jurisdiction of the court, to a non-opt-out Rule 23(b)(1) class, in which injunctive relief is predominant but money damages are also being sought. The Court of Appeals, however, never decided this constitutional issue because of its factual determination that Petitioners had voluntarily submitted themselves to the District Court's jurisdiction by arguing the merits of the Settlement Agreement.

Specifically, the Court of Appeals unanimously determined, as a factual matter, that each of the Petitioners submitted to the jurisdiction of the District Court, rather than making a special appearance solely to contest jurisdiction. In particular, the Court of Appeals found that "each of the [Petitioners] either had minimum contacts with the forum or submitted himself to the jurisdiction of the District Court by appearing through counsel to contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement." *White*, 41 F.3d at 408; *White*, 836 F. Supp. at 1503 nn. 92-95. Accordingly, the Court of Appeals found that Petitioners had waived any jurisdictional objections to the Rule 23(b)(1) non-opt-out

class so that it was unnecessary to reach the constitutional issue posed by Petitioners. *White*, 41 F.3d at 408; *White*, 836 F. Supp. at 1503 nn. 92-95.

There is clearly no conflict between the Court of Appeals' determination that Petitioners submitted to the jurisdiction of the District Court by their decision to argue the merits of the Settlement Agreement, and any prior rulings of this Court or the various circuits. Indeed, this Court has long recognized that personal jurisdiction is a "personal privilege" of a party that may be waived. *See Leroy*, 443 U.S. at 180; *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Neirbo Co. v. Bethlehem Ship Building Corp.*, 308 U.S. 165, 168 (1939) (the defense of lack of personal jurisdiction is a privilege, and can be lost in a number of ways, including "by failure to assert it seasonably, by formal submission in a cause, *or by submission through conduct*") (emphasis added). Applying this authority, every Court of Appeals has held that a party may submit itself to personal jurisdiction by actively litigating the merits of a case.[7]

Accordingly, the only jurisdictional issue decided by the Court of Appeals, and presented on this appeal, is the factual question of whether, by their actions, Petitioners submitted to

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[7] *See, e.g., Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983); *Datskow v. Teledyne, Inc., Continental Products Division*, 899 F.2d 1298, 1303 (2d Cir.), *cert. denied*, 498 U.S. 854 (1990); *In re Texas Eastern Transmission Corp.*, 15 F.3d 1230, 1236 (3d Cir.), *cert. denied*, 115 S. Ct. 291 (1994); *Capital Investors Co. v. Executors of Estate of Morrison*, 800 F.2d 424, 429 (4th Cir. 1986); *Broadcast Music, Inc. v. M.T.S. Enterprises*, 811 F.2d 278, 279 (5th Cir. 1987); *In re Wolverine Radio Co.*, 930 F.2d 1132, 1138 (6th Cir. 1991); *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993); *Alger v. Hayes*, 452 F.2d 841, 842-43 (8th Cir. 1972); *United States v. Vacant Land Located at 10th Street and Challenger Way in Palmdale, Cal.*, 15 F.3d 128, 131 (9th Cir. 1993); *Pipkin v. United States Postal Service*, 951 F.2d 272, 274 (10th Cir. 1991); *Pardazi v. Cullman Medical Center*, 896 F.2d 1313, 1317 (11th Cir. 1990).

the jurisdiction of the District Court. It is well-established that this Court will rarely disturb such "findings of fact in which two other courts below have concurred." *United States v. Doe*, 465 U.S. 605, 614 (1984).[8]

The reasons why this Court should not grant certiorari to consider due process issues not reached by the Court of Appeals below are underscored by the recent decision in *Ticor Title Ins. Co. v. Brown*, __ U.S. __, 114 S. Ct. 1359, 1362 (1994). In that case, this Court dismissed a grant of certiorari to consider a similar due process challenge to a non-opt-out class as being improvidently granted because the determination of a non-constitutional question, not addressed in any of the previous proceedings in *Brown*, might have made resolution of the constitutional issue unnecessary. *Id.* at 1361-62. *A fortiori*, any grant of certiorari to consider a due process challenge would be improvident in this case, since the Court of Appeals has already determined that it was not necessary to reach these due process issues.

Petitioners' assertion that the Court of Appeals "of necessity" determined the due process issue for the Class (Petition of Sean Jones, *et al.* ("Jones Pet.") at 3, 11) is without merit. The Court of Appeals merely held that by submitting to personal jurisdiction before the District Court, these individual class members had waived any due process objections. Nothing in the Court of Appeals' opinion would preclude other class members, who did not submit to personal jurisdiction, from arguing in a subsequent action that a Rule 23(b)(1) class cannot preclude their individual damages claims (although, as discussed below, Respondent/Plaintiffs would disagree with such an argument).

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[8] *See also Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 (1980); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635-36 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products*, 336 U.S. 271, 275 (1949).

B. Even If The Due Process Issue Was Properly Presented, Certification Of This Rule 23(b)(1) Class Would Not Conflict With *Shutts*

Alternatively, if the due process issue had not been waived, certiorari would still be inappropriate because the certification of this class action under Rule 23(b)(1) was wholly consistent with this Court's decision in *Shutts*, which was expressly limited to class actions in which the claims are "wholly or predominantly for money damages." 472 U.S. at 811 n.3. The Petitioners' assertion that *Shutts* implicitly holds that there is a due process right for class members not subject to personal jurisdiction to opt-out of a 23(b)(1) class action, such as this, involving predominant claims for injunctive relief (*see* Petition of Mark Dusbabek, *et al.* ("Dusbabek Pet.") at 11, 12; Jones Pet. at 2, 8) is directly at odds with this Court's "wholly or predominantly" test.

As the District Court found below, "the plaintiff class' claims for structural, injunctive relief 'predominate' over its claims for damages" (*see White*, 822 F. Supp. at 1411; *White*, 836 F. Supp. at 1472). This determination flowed directly from the fact that the principle relief sought and obtained by the Class was the radically new free agency system created by the Settlement Agreement. Such a non-opt-out class action, which is not "wholly or predominantly" for money damages, does not conflict with *Shutts*.[9]

For the same reason, this case does not present any conflict with the decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 114 S. Ct. 1359 (1994). The Ninth Circuit in *Brown* expressly

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[9] *See, e.g., Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 464 (1994), *motion to reconsider or certify for interlocutory appeal denied*, (N.D. Cal. Sept. 15, 1994); *In re Jackson Lockdown/MCO cases*, 107 F.R.D. 703, 713-14 (E.D. Mich. 1985); 7B C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1789, at 256 (2d ed. 1986); 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 1.19, at 1-18.

recognized that the ruling in *Shutts* applied solely to "claims wholly or predominantly for money damages." *Brown*, 982 F.2d at 392. It then went on to hold that the specific 23(b)(1) class at issue before it was subject to the opt-out requirements of *Shutts* because the predominant claims at issue were for monetary relief. Indeed, since the decision in *Brown*, the Ninth Circuit has had occasion to rule that a district court did not abuse its discretion by certifying a non-opt-out damages and injunctive relief class under Rule 23(b)(1), where the claims for money damages did not predominate. *See Arata v. Nu Skin International, Inc.*, 1993 WL 321710 (9th Cir.) (opinion not reported). Where, as here, "a lawsuit (1) combines claims for monetary relief with claims for declaratory or injunctive relief, and (2) the monetary claims do not 'predominate,' . . . no additional notice or chance to opt-out is required in order to satisfy due process requirements." *Arnold v. United Artists Theater Circuit, Inc.*, 158 F.R.D. 439, 464 (1994), *motion to reconsider or certify for interlocutory appeal denied*, (N.D. Cal. Sept. 15, 1994).

The reasons why a right to opt-out for absent class members is not required by due process in the different circumstances presented by a class action in which claims for money damages are not predominant stem from the fact that the protection of the rights of individual class members is much more interdependent with the resolution of the rights of other class members in actions in which substantial injunctive relief is being sought. *See White*, 822 F. Supp. at 1412, *citing* 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 1.20 (3d ed. 1992). This is particularly evident in antitrust class actions brought by professional athletes which seek substantial injunctive relief in order to create a single new, highly interdependent free agency system for all class members. It is thus not surprising that all prior antitrust class action settlements by players in professional team sports, including *Alexander v. NFL*, 1977-2 Trade Cas. (CCH) ¶61,730 (D. Minn. 1977), and *Robertson v. NBA*, 72 F.R.D. 64 (S.D.N.Y.

1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977), have been non-opt-out settlements, which included both a new free agency system (through injunctive relief) and a settlement of damages claims. This long-standing and well-established principle of class action law and practice does not present any conflict with the due process requirements for class actions predominantly seeking monetary damages articulated by *Shutts*.

Petitioners' argument that they should be able to reap the substantial benefits of the new free agency system created by the injunctive relief portion of the Settlement Agreement, while retaining their right to opt-out of the damages part, would make it virtually impossible to settle 23(b)(1) class actions in which claims for injunctive relief predominate. Consider, for example, the enormous benefits received from the new free agency system by petitioner O'Neal, who increased his average yearly compensation by 180% as a free agent; Petitioner Allen, who increased his compensation by 300%; Petitioner Martin, who enjoyed a 120% increase; Petitioner Dishman, who received an 80% increase; and Petitioner Hurst, who reaped a 240% increase.[10] Due process does not require that such class members, who necessarily receive the substantial benefits of the injunctive relief provided by the Settlement Agreement, also be given the right to pick and choose whether they are willing to accept the damages part of the same settlement.

C. The Lower Courts' Approval Of The Settlement Agreement As Fair, Reasonable, And Adequate To Class Members Presents No Issue Warranting This Court's Review

Each of the Petitioners' remaining arguments for certiorari review present challenges to fact-specific determinations by

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[10] These amounts are over and above the substantial damages payments these Petitioners will receive pursuant to the Settlement Agreement, which total over $2.2 million, representing an average payment of over $125,000 to each Petitioner.

the courts below arising out of their approval of the Settlement Agreement. However, this Court has held that it will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products*, 336 U.S. 271, 275 (1949), and cases cited therein; *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").[11] No such "obvious and exceptional" error has been identified by Petitioners.

1. Federal Rule of Civil Procedure 23(e) requires that notice of a class action settlement be provided to all members of a class. It is well settled that the mechanics of the notice process are left to the sound discretion of the district court, subject only to "the broad 'reasonableness' standards imposed by due process," and will not be upset absent a clear showing that the district court abused its discretion. *Grunin v. International House of Pancakes*, 513 F.2d 114, 121 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354-59 (1978) (reviewing class action notice under abuse of discretion standard).

Although the Petitioners challenge the notice to the Class ordered below (*see* Dusbabek Pet. at 14-15), it is clear that these claims are frivolous. The District Court ordered notice by publication in a national newspaper, *and* individualized notice of the Settlement Agreement by direct mail to all identifiable class members. *White*, 836 F. Supp. at 1462, 1466. This Court has held that such notice by mail is the best possible type of notice under the circumstances. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974) (where names and addresses of class members are readily ascertainable,

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[11] *See also Berenyi*, 385 U.S. at 635; *Branti*, 445 U.S. at 512 n.6; *Rogers*, 458 U.S. at 623 (1982); *Doe*, 465 U.S. 605; *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Goodman v. Lukens Steel Co.* 482 U.S. 656, 665 (1987).

individual notice by mail is "clearly the best notice practicable"). Accordingly, there cannot possibly be an issue worthy of Supreme Court review in the details of the individual notice that both courts below approved.

2. Similarly, Petitioners fail to cite any cert-worthy issue arising out of the Court of Appeals' approval of the Settlement Agreement as fair, reasonable and adequate, and in the best interests of the Class (*see* Dusbabek Pet. at 18-19). To the contrary, all of the Petitioners' claims in this regard are primarily factual in nature and amount to a request for this Court to review those factual findings.

As this Court has repeatedly recognized, the determination of the fairness and adequacy of a class action settlement is principally a factual one left to the discretion of the District Court, which should not be overturned on appeal unless it constitutes a clear abuse of discretion. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717, 742-43 (1986) ("we shall rely primarily on the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances"); *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (reviewing class action certification under abuse of discretion standard). The reason for such deference is that only the district court is "exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." *Grunin*, 513 F.2d at 123.

In this case, the District Court Judge, David S. Doty, developed a thorough knowledge and understanding of the issues involved in the Settlement Agreement through his experience in presiding over both the *White* action and a host of prior actions in which NFL player movement rules were at issue. Of particular assistance to Judge Doty was his experience in presiding over, and his familiarity with the record in, *McNeil v. NFL*, which included a three month trial which resulted in

over 8,000 pages of trial transcript and over 400 exhibits. *See White*, 836 F. Supp. at 1467 n.24.

In detailed findings of fact, set out in two lengthy and exhaustive opinions, Judge Doty found that the Settlement Agreement provided enormous benefits to the class, both in its creation of a new free agency system—which has led to unprecedented player movement and vastly higher salaries to NFL players—and in its payment of $115 million to class members for injuries arising out of Plan B and other restrictions imposed in the past by the NFL clubs.[12] *See White*, 822 F. Supp. at 1412-14, 1419. After weighing these significant benefits against the prospect of continuing with protracted and risky litigation, as well as the irreparable injury to class members that would be caused by any new set of restrictions that the NFL would likely attempt to impose, the District Court reached the well-supported conclusion that the Settlement Agreement was in the best interests of the Class. *Id.* at 1432. This was particularly true in light of the short careers of most class members, who would be long retired from the NFL before all litigation was complete. *See Jackson*, 802 F. Supp. at 231.

Moreover, the fact that (i) less than 2% of all class members ever objected to the Settlement Agreement, and (ii) the terms of the new free agency system were incorporated almost verbatim in a collective bargaining agreement approved by over 96% of the NFL players who voted on ratification, provides compelling evidence of the overwhelming support

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[12] Between March 1, 1993, when the new free agency rules went into effect, and June 23, 1993, the average salaries of NFL players who signed new contracts more than doubled, exceeding $1 million per year. *White*, 836 F. Supp. at 1479-80. In addition to such huge salary increases, there has been unprecedented player movement under the new free agency system. In 1993, and again in 1994, over 100 NFL players switched clubs as Unrestricted Free Agents. Thus, the marketplace experience under the new free agency system provides "substantial evidence that the Settlement Agreement provide[d] significant benefits to the class." *White*, 41 F.3d at 408 (citing *White*, 836 F. Supp. at 1479-83).

among class members for the Settlement Agreement. This further demonstrates why there is no cause for this Court to grant certiorari to review the lower courts' fact-based approval of the Settlement Agreement.

3. Finally, Petitioners fail to raise any cert-worthy issue in their challenge to the adequacy of class representation. As both lower courts held, "the adequacy of class representation . . . is ultimately determined by the settlement itself." *White*, 41 F.3d at 408; *White*, 822 F. Supp. at 1406.[13] Accordingly, there can be little doubt that such representation was adequate where, as here, the Class received hundreds of millions of dollars in free agency benefits and $115 million in actual damages (in addition to the other substantial benefits provided by the global litigation settlement).

Similarly, there is no reason for this Court to review the Court of Appeals' determination that the fact that "named plaintiffs received additional awards based on their efforts and risks in the case" did not render them inadequate class representatives (*White*, 41 F.3d at 408). As numerous other courts have held, such additional consideration to class representatives who gain substantial benefits for the class is often appropriate and within the sound discretion of the district court to approve. *See Luevano v. Campbell*, 93 F.R.D. 68, 69 (D.D.C. 1981) ("where there are sufficient indications that the class has been treated fairly and that the relief for the named plaintiffs is not excessive, the provision of greater monetary relief for the named plaintiffs than for class members does not warrant disapproval of the settlement").[14] There

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[13] *See also In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 152 (S.D. Ohio 1992).

[14] *See also Thornton v. East Texas Motor Freight*, 497 F.2d 416, 470 (6th Cir. 1974) ; *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 250 (S.D. Ohio 1991); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. at 710; *Huguley v. General Motors Corp.*, 128 F.R.D. 81, 85 (E.D. Mich. 1989) *aff'd*, 925 F.2d 1464 (6th

was more than an adequate record to support the lower courts' determinations that the class representatives here—who risked retaliation from the NFL to obtain the substantial relief granted to the Class—deserved the limited additional benefits that were provided.

CONCLUSION

For the foregoing reasons, Petitioners have failed to raise any issues that warrant this Court's review and their Petitions for Certiorari should be denied.

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Cir.), *cert. denied*, 502 U.S. 909 (1991); *Lo Re v. Chase Manhattan Corp.*, 19 Fed. Empl. Prac. Cas. (BNA) 1366, 1369 (S.D.N.Y. 1979); *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004, 1020 (E.D. Wis. 1984); *Women's Committee v. National Broadcasting Co.*, 76 F.R.D. 173, 180 (S.D.N.Y. 1977).